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INTRODUCTION

Today, the United States is invoked less as a country that conforms to its international legal obligations than as an "exemplar of might."[1] This has not always been the case. The early U.S. republic of the late eighteenth century was a relatively weak military and economic country. The United Kingdom, France, the Netherlands and even Spain were countries that were more prosperous economically and militarily superior countries than the United States. In this Essay, I focus on the international legal jurisprudence of the Marshall Court during this period of U.S. military and economic weakness.

An examination of this jurisprudence leads to three conclusions. First, that the Marshall Court, primarily motivated by the young country's relative economic and military weaknesses, adopted a policy of neutrality in international commerce. Second, that in seeking to ensure the United States' commercial relations conformed to international legal obligations of a neutral nation, the Marshall Court played a constructive role in solidifying the early regime of international economic governance through

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1. Pratap Bhanu Mehta, *Empire and Moral Identity*, 17 ETHICS & INT'L AFF. 49 (2003); *see also* NAT'L SECURITY COUNCIL, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1 (2002), http://www.whitehouse.gov/nsc/nss.pdf (acknowledging that the United States possesses "unprecedented—and unequaled—strength and influence in the world.").

law. Third, that this early regime of international economic governance through law was bifurcated between a regime of complete reciprocity between States and a second regime of non-reciprocity or unequal exchange between States and entities regarded as not rising to the status of statehood in eighteenth and nineteenth century international law. While the regime of complete reciprocity governed relations between and among European States and the emerging United States, the regime of non-reciprocity was espoused as governing relations between conquering European States, as well as the United States, and non-European entities.

In short, my thesis is that the Marshall Court was the crucible within which international economic legal norms such as those of reciprocal or equal exchange and neutrality were sought to be solidified as a counterweight against the depredations of the more militarily superior naval forces of the United States' European trading partners. However, just at the moment when the Marshall Court was solidifying strong rules of reciprocity and equal exchange, it was simultaneously proceeding to produce a jurisprudence of conquest and of non-reciprocal relations with the Indian populations of the United States.

Military force and economic power were factors in the solidification of reciprocal and non-reciprocal norms. Inferior military force and economic power were crucial in the creation of reciprocal norms since these norms were being crafted and interpreted by the courts of a country facing States with superior military and economic might. These more powerful countries had, in the eyes of the weaker United States, engaged in creating the "rule of the jungle" in international commerce. The Marshall Court intervened by announcing norms that sought to ensure that commerce got safe passage particularly during wartime or in times of international political and economic divisions. These norms were, in effect, crafted to counter the rule of the jungle in international commercial relations preferred by the economically and militarily stronger States. Superior military force was also a factor in the establishment of the non-reciprocal regime of U.S.-Indian relations since the Court justified its jurisprudence on the basis of the military conquest of Indian territory. Thus, when the Marshall Court was announcing the most liberal rules of reciprocity in its international trading and economic relations with its

European counterparts, it was concurrently establishing an illiberal regime of subjugating the non-European inhabitants of North America to a regime of non-reciprocity and inequality.

This Essay proceeds as follows. Part I discusses the United States' military weaknesses and its economic dependency on European countries in the late eighteenth to early nineteenth century. Part II discusses the judicial creativity of the Marshall Court, particularly in establishing rules of equal exchange between neutrals and belligerents during war. Part III will show how the Marshall Court at the same time created rules of unequal exchange between the United States and Indian nations.

I. THE UNITED STATES' MILITARY WEAKNESSES AND ECONOMIC DEPENDENCE IN THE LATE EIGHTEENTH CENTURY

The late eighteenth century United States was a militarily and economically weak country. Its military and naval capability could not rival that of the British or French. Its economy was also heavily dependent on these European countries for credit as well as both a source of imports and as a market for its goods.

With regard to its economy, a large segment of U.S. federal revenue in the late eighteenth century was derived from import taxes primarily from Great Britain. Although France had hoped to replace Great Britain's position in this economic relationship with the United States, it failed in doing so. In addition, Alexander Hamilton and his followers felt it was the United States' trade relationship with Great Britain that kept the United States together.[2]

In fact, Hamilton, the Secretary of the Treasury in the George Washington administration, believed that supporting France while it was at war with Great Britain would amount to commencing an indirect war between the United States and the British. This would, in turn, undermine the important United States trade relationship with Great Britain.[3] The relative weakness of the United States vis-a-vis France and Great Britain was not an

2. *See* FORREST MCDONALD, THE PRESIDENCY OF GEORGE WASHINGTON 119-20 (1974).

3. *See id.*

insignificant factor in the decision by the United States to remain neutral in its relationships with these European powers. Congress affirmed neutrality by passing the Neutrality Act in the summer of 1794.[4] The Act endorsed President Washington's neutrality proclamation and made it illegal for U.S. citizens to "enlist in the service of a foreign power" and banned foreign armed vessels from being fitted in U.S. ports.[5]

Thus, notwithstanding heavy promptings by France to take hostile actions against the British, the United States demurred. The United States' dedication to neutrality was not taken well by the French, who felt that the United States was being disloyal after the French had recently assisted it against the British in its fight for independence.

The Jay's Treaty of 1794 epitomized the upper hand of the British in its relations with the United States.[6] Though intended by the Washington administration to have ended British captures of American cargo unrelated to war from the seas and the impressments of American men by the British navy, the Jay's Treaty failed to do either. Further, it effectively abandoned the neutrality principles to which the United States had committed itself. Hence, rather than affirm its freedom of the seas under which "free ships make free goods," "neutrals have the right to trade freely in non-contraband goods with belligerents," and that "contraband lists must be limited to war materials,"[7] in Jay's Treaty, the United States acquiesced to British supremacy on the high seas. Further, under the terms of the treaty, Great Britain revived the "Rule of 1756" under which neutrals were foreclosed from trading with British enemy ports during wartime.[8] The United States also gave exclusive rights to the usage of American ports to the British under the treaty.[9] The Washington administration was heavily criticized in the United States for giving too much to the

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4. Neutrality Act, ch. 50, 1 Stat. 381 (1794).

5. MCDONALD, *supra* note 2, at 145.

6. Jay's Treaty, U.S.-Gr. Brit., Nov. 19, 1794 [hereinafter Jay's Treaty], *available at* http://memory.loc.gov.

7. MCDONALD, *supra* note 2, at 154.

8. *See* Jay's Treaty, *supra* note 6, art. XVIII.

9. *See* Gregory E. Fehlings, *America's First Limited War*, 53 NAVAL WAR C. REV. 103, 108 (2000).

British at a time when they were experiencing losses around the world.[10]

In response to this cozying up to the British, France began targeting and attacking American merchant ships. In less than a one-year period between 1796 and 1797, the French had captured over 300 American merchant ships.[11] The United States was practically defenseless against such French aggression since it lacked warships to defend its merchant ships. By 1800, the United States lost over 2,000 of these merchant ships.[12] While America suffered these losses at home, France was drunk with joy with victory after victory in Europe. France now had its aggression directed towards America, particularly with aspirations of creating a French colony in America and ending the westward expansion of the United States.[13] These plans were a real threat to the United States. France's army of 800,000 men had proven to be skilled in battle and would surely make short work of America's small 3,000-man army.[14]

This military inferiority in turn molded the United States' response to France's aggressive actions. The actions taken in retaliation to the French actions were not military in nature because such actions were likely to be futile and could lead to a disastrous result for the United States if France's military should retaliate.[15] Congress refused to allow vessels to carry arms for self-defense purposes and also used revenue cutters as an attempt to thwart French attacks.[16]

In an effort to avoid a war with France, President Adams sent a delegation of three prominent United States political figures to France in 1797.[17] These figures included future Supreme Court Chief Justice John Marshall, founding father Charles Pickney, and Elbridge Gerry, who

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10. *See* MCDONALD, *supra* note 2, at 152-53.

11. Fehlings, *supra* note 9, at 108.

12. *Id.*

13. *Id.*

14. *Id.*

15. *See id.*

16. *Id.* at 109.

17. *Id.*

signed the Declaration of Independence. The French informed the delegation that they would not negotiate until the United States government assumed French debts to American suppliers, indemnified France against claims by American ship owners, extended a large loan to France and apologized on behalf of President Adams for earlier comments made against France.[18] The delegation refused to accept these terms not only because they were heavily prejudicial to the United States, but also because extending a loan to France would risk the appearance of the United States not being neutral in its relations with Great Britain. French representatives threatened that if all three members of the delegation left France, France would declare war on the United States. As a result of this threat one member remained in France.[19] President Adams announced that the French negotiations had failed and now sought to prepare the United States for a possible French attack.[20] President Adams pushed Congress to allow merchant ships to carry arms for self-defense. Earlier, President Washington had imposed a restriction against arming merchant ships. President Adams lifted this restriction.[21] This action caused a furious reaction by the Democratic-Republican Party led by Vice President Thomas Jefferson. Then Congressman James Madison called Adams' action "a usurpation by the Executive of a legislative power."[22] Once the American public heard of the insulting offer made by France to the United States, popular opinion was for declaring war against the French. Adams chose to wage a defensive, undeclared, and limited naval war. Adams' objectives were to repel French aggression and to force France to respect American autonomy. Congress provided for national defense but never declared war against France.[23]

In 1798, Congress responded to Adams' requests for increased security by creating the Navy and Marine Corps.

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18. *Id.*

19. *Id.* The remaining member was Elbridge Gerry, who stayed at the insistence of French foreign minister Charles Maurice de Talleyrand-Périgord.

20. *Id.* at 110.

21. *Id.*

22. *Id.*

23. *Id.*

Fearing an invasion by France on United States soil, President Adams convinced a reluctant, retired President George Washington to come out of retirement and lead the United States Army. The United States was ill-prepared both militarily and politically to handle a French invasion. However, the Democratic-Republican parties, also called Jeffersonians, were still loyal to the French and would not support a war against France.[24]

The War of 1812 was yet another occasion illustrating the military weakness of the United States in its relations with the British. In his second Inaugural Address, James Madison described the war as necessary to maintain national sovereignty, particularly on the sea, as well as in maintaining the United States' equality as a nation to other nations around the world.[25] Madison asserted that the war was the result of the grave abuse and injustice inflicted upon U.S. commerce by the British.[26] President Madison pointed out that the United States had reluctantly declared war and only as a last resort.[27] Madison said in his speech that although war was not verbally declared against the United States, war had nevertheless already been waged against it physically.[28] For instance, Madison gave examples of U.S. mariners who were being forced off of their vessels into foreign vessels.[29] In addition to the taking of American vessels, the British had often failed to give those captured the status of prisoners of war. Instead the British treated them as traitors and deserters—quite unjustly in Madison's view.[30] Madison advocated for the United States to fight for its rights in order to avoid having to do so again anytime in the immediate future.[31]

Thus, it was argued that the United States chose to invade Canada during the War of 1812 as a means of

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24. *Id.*

25. *See* U.S. GOV'T PRINTING OFFICE, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 26 (1974).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 27.

30. *Id.*

31. *Id.* at 28.

rectifying the abuse inflicted upon it by the British at sea.[32] A Canadian invasion would give the United States more weight when negotiating with Great Britain. Therefore, the rationale for this invasion was that since the United States could not compete with the British at sea, prevailing on the Canadian front would force Great Britain to respect the United States' maritime rights.[33] In 1812, Canada served as Great Britain's access to American resources as well as a growing source of other raw materials essential to British industry, including timber for the Royal Navy.[34] For this reason, Madison felt that an attack on Canada would be an appropriate response to the maritime problems that existed between the two nations.[35]

Merchants in the United States were also fed up with depredations they had been suffering at the hands of the British. Merchants from across the east coast created memorials to express their views to Congress. Mr. Jefferson delivered the memorials' message to Congress, expressing the merchants' resentment of the British.[36] The U.S. President instructed Monroe, who served as the United States minister to Great Britain, to insist on the rights of the United States.[37] The merchants' pro-war views towards the British were significant because they had traditionally sought to avoid war, as it would be harmful to commerce. These same merchants were now pushing for the United States Army and Navy to protect their rights against the British. Boston merchants pushed the United States to adopt a policy that would avoid the continued embarrassment of the United States and that would "support the dignity of the United States."[38]

American merchants also complained about the harm they suffered as a result of British Orders in Council. These

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32. *See* J.C.A. Stagg, *James Madison and the Coercion of Great Britain: Canada, the West Indies, and the War of 1812*, 38 WM. & MARY Q. 3, 3 (1981).

33. *See id.* at 4.

34. *See id.* at 26-27.

35. *See id.* at 6.

36. *See* BENSON J. LOSSING, THE PICTORIAL FIELD-BOOK OF THE WAR OF 1812, at 140 (1869).

37. *See id.* at 141.

38. *Id.*

British orders were intended to be countervailing measures against the American Embargo Act that Congress had passed in 1807.[39] American merchants viewed these orders as constituting aggressive action against the United States.[40]

Napoleon further harmed American commerce in November of 1806 by declaring that the British Islands were to be in a state of blockade, forbidding all trade with England and deeming possession of British products to be contraband. This decree was made from the Imperial Camp at Berlin. In addition, the British prohibited any neutral trade with France unless it was made through Great Britain itself. The British claimed this move was in retaliation to the Berlin Decree.[41] This course of action by the British then set in motion even more aggressive commercial assaults on British commerce. Thus, by the Article of Milan Decree of 1807 Napoleon declared that any vessel that submits to British search, pays a tax to the British, is destined to or coming from a British port, is to be considered denationalized.[42] This took a devastating toll on United States maritime commerce resulting in the near removal of all American vessels from the sea.[43] In effect, the commercial war between the British and French had a very negative and devastating impact on American commerce at sea.

Another furor arose when British deserters boarded an American vessel, the *Chesapeake*. Eager to maintain peaceful relations with the British, the United States had negotiated a deal whereby it would return to the British any British deserters. Having knowledge that the British deserters were enlisted for service on board the *Chesapeake*, the *Leopard*, a British vessel, followed the *Chesapeake* out to sea. A British boat came alongside the *Chesapeake* and showed orders demanding all deserters. In a short time, a shot was sent from the *Leopard* to the *Chesapeake*. The British vessel assaulted the *Chesapeake* with round after

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39. American Embargo Act, ch.5, 2 Stat. 455 (1807).

40. *See* LOSSING, *supra* note 36, at 151.

41. *See id.* at 153-54.

42. REGINALD HORSMAN, THE CAUSES OF THE WAR OF 1812, at 121, 141-42 (1962).

43. *See* LOSSING, *supra* note 36, at 154.

round, resulting in the death of three Americans and injuring eighteen more. After the brutal and unprovoked assault, two British lieutenants boarded the *Chesapeake* to retrieve the deserters. America united in fury against the British and wanted them to pay for their assault on the *Chesapeake*. Some even desired an immediate declaration of war against the British.[44] The events at the *Chesapeake,* combined with the British decree, resulted in the President recommending to Congress the passage of an Embargo Act.[45] The Bill passed prohibited all vessels from sailing to foreign ports, except for foreign ships in ballast. This embargo was an attempt to force the rest of the world, specifically the French and British, to respect American commerce. The withholding of this commercial intercourse was an attempt to pressure France and Great Britain into respecting the rights of a neutral nation.[46]

This prohibition was seen as a last attempt to avoid going to war with more powerful European nations.[47] Thus, between 1809 and 1811, the United States stopped all trade with France. The United States viewed this as a means to prevent France from world domination.[48]

Ultimately, by the 1814 Treaty of Ghent, the United States and the British agreed to stop further hostilities at sea and land. Additionally, all property and territory taken during the war was to be returned.[49] The Third Article provided that all prisoners of war will be returned at the end of the hostilities.[50] Thus, through diplomacy and treaty-making, the United States sought to address its inability to militarily respond to interference with its commerce on the high seas. In the next part of this Essay, I explore how the Supreme Court responded to the depredations of U.S. commerce at the mercy of militarily powerful countries.

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44. *See id.* at 158-59.

45. American Embargo Act, ch.5, 2 Stat. 455 (1807).

46. *Id.* at 163; *see also* Non-Intercourse, 3 WHARTON DIGEST § 319, at 103.

47. LOSSING, *supra* note 36, at 163.

48. *See* Stagg, *supra* note 32, at 4.

49. *See* Treaty of Ghent, U.S.-Gr.Brit., Dec. 24, 1814, *available at* http://www.yale.edu/lawweb/avalon/diplomacy/britain/ghent.htm.

50. *Id.* art. III.

II. INTERNATIONAL LEGAL RESPONSES TO THE UNITED STATES' MILITARY AND ECONOMIC WEAKNESSES

> "To have submitted our rightful commerce to prohibitions and tributary exactions from others would have been to surrender our independence. To resist them by arms was war, without consulting the state of things or the choice of the nation."[51]

In Part I, I demonstrated the military and economic weaknesses of the United States in the late eighteenth century to early nineteenth century. In this part, I focus on the international legal jurisprudence of the Marshall Court during this period. The main innovations of the court during this period that I focus on are: first, the invocation and refinement of rules of neutrality; and second, the rule that commerce should have safe passage in times of war as evidenced by cases in which the court found that confiscation of private property during wartime was forbidden. In each of these areas, the Marshall Court helped to solidify emerging rules of liberal trade as a counterweight to the abuses of free trade occasioned by depredations of American ships by countries with superior naval capabilities. These rules were eventually adopted in the Hague Regulations of 1907 that followed the Hague Peace Conference of the early twentieth century.[52]

Though analyzing the birth of these innovations in international legal jurisprudence is important, equally important is observing the evolution and growth of Justice Marshall himself; for most of these new rules are products of his experience as an attorney, Minister to France,[53]

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51. This is a quote of President Jefferson justifying the Embargo Act of 1807 and resisting pressure for its suspension. Under this Act, foreign ships were banned from sailing from any American port. Some limited exceptions were made but the Act served as a withdrawal of American commerce from the world in retaliation to British and French confiscations of American ships and resisting pressure to suspend it and to allow the continuance of commerce. *See* LOSSING, *supra* note 36, at 170.

52. *See, e.g.*, Berg v. British & African Steam Navigation Co. (The *S.S. Appam*), 243 U.S. 124 (1917).

53. According to Francis Howell Rudko, Marshall's experience as Minister to France prepared him for the "issues raised in the cases involving prize and

Secretary of State,[54] and Chief Justice of the Supreme Court.[55]

A. *The Early Justice Marshall: Defending Virginian Debtors Against British Creditors*

To appreciate the importance of the innovations of the Marshall Court under the law of nations, it is important to go back to Justice Marshall's career prior to becoming a Justice of the Supreme Court. As a Virginia lawyer, John Marshall defended Virginians who owed pre-revolutionary war debts to British creditors.[56] He litigated in part to overcome the provisions of Article IV of the 1783 Treaty of Paris, which declared in part that these creditors should not "meet lawful impediments" in recovering the full value of these debts that had been bona fide contracted.[57] Marshall defended these debtors and Virginian debtor relief laws, in part, on the premise that the treaty supremacy clause of the federal Constitution did not entitle the federal government to enter into the 1783 Treaty of Paris. He argued that this treaty abrogated the rights of the state of Virginia by allowing British debtors to recover their debts, which the State of Virginia had confiscated and sequestrated by state law.[58]

It is important to note that in this respect, John Marshall supported the Virginian debtors because, like the anti-federalists of the period, he supported the rights of states like Virginia as victors in the Revolutionary War that were now entitled to confiscate British debt. The anti-federalists also saw confiscation as a way of easing the

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neutrality." FRANCIS HOWELL RUDKO, JOHN MARSHALL AND INTERNATIONAL LAW: STATESMAN AND CHIEF JUSTICE 68 (1991). Marshall was appointed Minister to France by President Adams in early June 1797. *Id.* at 47. For more information on Marshall's role as Minister to France, see *id.* at 47-82.

54. Marshall was appointed Secretary of State by President Adams in 1800. For more information on his role as Secretary of State, see *id.* at 96-120.

55. *See infra* Part II.

56. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

57. Treaty of Paris, U.S.-Gr. Brit. Sept. 3, 1783, *available at* http://www.archives.gov/exhibits/american_originals/paris.html.

58. *Ware*, 3 U.S. at 202.

burden of poverty and famine for former colonists.[59] As I shall show below, as a Justice of the Supreme Court, John Marshall by contrast became one of the leading proponents of giving commerce safe passage during war—a position quite at odds with his defending Virginian debtors.

As an attorney, the most numerous classes of cases Marshall took on during his legal career—over one hundred during the 1790s—concerned suits initiated in the 1790s by British subjects to recover debts[60] that Virginians had contracted before the Revolution.[61] These actions stemmed from pervasive anti-British sentiment in Virginia during the 1780s. Although the fourth article of the 1783 peace treaty with Great Britain stated that "creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted,"[62] as we saw above, the Virginia Assembly in 1783 directed that state courts remain closed to British creditors. Virginians feared an onslaught of suits that would undermine the State's already jeopardized finances. The federal courts, established under the Judiciary Act of 1789,[63] offered a better opportunity for British creditors. There, Federalist judges who held an

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59. Notably, Marshall had in the House of Delegates following the Philadelphia Convention supported the interests of creditors as opposed to those of debtors. For example, Marshall had supported provisions in the draft Constitution that would have impeded the collection of British debts. The provision in question here is article 3, section 2 of the U.S. Constitution, which would have granted to federal courts jurisdiction over "[c]ontroversies . . . between a State, or the Citizens thereof, and foreign states, Citizens, or Subjects." to intrude the national government into economic matters properly left to individuals and the states. *See* U.S. CONST. art. III, § 2. Marshall had also helped to draft the repeal law passed on December 12th with an amendment suspending it until Britain complied with all terms of the peace treaty of 1793; he voted against including the amendment. In addition, Marshall helped write a bill for establishing district courts, which creditors had long sought to speed up debt suits that tended to languish in the county courts. Marshall voted against the final bill, but for reasons unrelated to debtor-creditor matters. *See* JOURNALS OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA, OCT. 1787 SESS., *passim* (1828).

60. In 1791, the British government estimated that the value of the debt exceeded 2,300,000 British pounds.

61. DAVID ROBARGE, A CHIEF JUSTICE'S PROGRESS: JOHN MARSHALL FROM REVOLUTIONARY VIRGINIA TO THE SUPREME COURT 132 (2000).

62. *See* Treaty of Paris, *supra* note 57, art. IV.

63. Judiciary Act, ch. 20, 1 Stat. 73 (1789).

overwhelming majority of seats on the federal bench were regarded as being more sympathetic to British interests than were the mostly anti-federalist judges on the Virginia courts. During the next several years, the U.S. Circuit Court in Virginia heard hundreds of such cases, or approximately three-fourths of its docket.[64]

In these cases, Virginia debtors entered, in addition to the regular common law pleas, a set of special pleas that raised questions of law that the courts would have to decide before juries could address any issues of fact. These pleas, eventually numbering four, declared that: (1) the debtors' payments made to the state loan office under a 1777 sequestration law legally discharged the debt; (2) that two other wartime acts, which vested all British subjects' property in the state government and prohibited recovery of British debts not assigned before May 1777, were still in effect; (3) that British violations of the seventh article of the peace treaty, pertaining to the confiscation of slaves and the continued occupation of forts in the Northwest, abrogated the peace treaty; and, (4) that dissolution of the colonial relationship on July 2, 1776, annulled the British plaintiffs' rights of recovery.[65]

No courts heard any arguments on the British debt cases until November of 1791, when Marshall represented Thomas Walker in *Jones v. Walker*.[66] For a variety of reasons, this case was not decided until the end of 1792.[67] A full circuit court, consisting of Chief Justice John Jay, Associate Justice James Iredell and District Judge Cyrus Griffin, finally convened in May of 1793. By then, plaintiff Jones had died, and all of his many suits had to be revived by special writs in the name of his estate's administrator, John Tyndale Ware. To prevent another postponement, the court ordered that one of those suits, against prominent Richmond merchant Daniel Hylton, be revived in Ware's name. *Ware v. Hylton*[68] thus became the new test case for

64. *See* ROBARGE, *supra* note 61, at 133.

65. *See* RUDKO, *supra* note 53, at 24-25.

66. 13 F. Cas. 1059 (C.C. Va. 1832) (No. 7,507).

67. *See* Charles F. Hobson, *The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797*, 92 VA. MAG. HIST. & BIOGRAPHY 176-87, 193 (April 1984).

68. 3 U.S. (3 Dall.) 199 (1796).

the special pleas. The court heard the case from May 24th to June 7th; Marshall argued his points on the 29th and 30th. While Marshall's notes have been lost, Justice Iredell kept several pages of words and phrases which, when joined with materials on the 1796 appeal of the case, make Marshall's main contentions evident.[69] Besides extrapolating from the special pleas, he also discussed some of the constitutional issues, such as the authority of states relative to the federal treaty-making power that judges had previously avoided. His essential point was that the peace treaty repealed conflicting state laws prospectively but could not undo actions taken while the Virginia sequestration act was in effect.[70]

It is interesting to note that *Ware v. Hylton* was Marshall's only appearance before the Supreme Court arguing a case. In the case, Marshall avoided directly disputing the plaintiff's constitutional point that treaties were supreme over state laws. Instead, he sought to persuade the Justices that "fair and rational construction" of the peace treaty would lead them to conclude that Virginia was correct in this instance—that loan office payments were not lawful impediments.[71] In a 4-1 decision issued on March 7th, the Court rejected Marshall's "ingenious, metaphysical reasoning and refinement upon the words, debt, discharge, [and] extinguishment" as contradicting accepted principles for interpreting treaties, and held that Article 4 of the peace treaty annulled Virginia's 1777 debt law and allowed British creditors to pursue recovery.[72] In essence, the Court struck down the claim that Virginia could confiscate private debts because they were the property of enemy aliens.[73]

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69. RUDKO, *supra* note 53, at 25.

70. *See* LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 158-60 (1974).

71. *See* 3 THE PAPERS OF JOHN MARSHALL 7-14 (William C. Stinchcombe et al. eds., Univ. of N.C. Press 1979) (1939); 5 THE PAPERS OF JOHN MARSHALL 317-25 (Charles F. Hobson et al. eds., Univ. of N.C. Press 1987) (1939); *see also* 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 192 (1916).

72. DAVID ROBARGE, *supra* note 61, at 136.

73. Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. OF INT'L L. 213, 217 n.23 (1998); *see also* RUDKO, *supra* note 53, at 26-30.

B. *Marshall's Government Experience: Development of International Legal Jurisprudence Grounded in the Policy of Neutrality*

In order to fully appreciate the foundation upon which Justice Marshall grounded his reasoning in later Supreme Court Cases, it is important and necessary to examine his experiences in the political milieu of the 1790s.

Although the Treaty of Paris in 1783 formally ended the Revolutionary War between the United States and Great Britain, the political hostility between the two States did not cease.[74] At the same time, the political environment was also divided within the young nation as it attempted to formulate its policies regarding domestic and foreign issues.[75] When, in 1793, France declared war against Great Britain, these divisions grew deeper as nascent political parties adopted either a pro-British or pro-French stance.[76] President Washington, cognizant of the "importance of neutrality to American commerce and national survival,"[77] issued on April 22, 1793 the Proclamation of Neutrality.[78]

Although there was much domestic opposition to the Proclamation, Marshall embraced it.[79] He viewed the opposing sentiments, especially those of the Republicans who favored alliance with the French, as signs of "repudiation of national union and a tendency erroneously to equate national interest with French or foreign interest."[80] In essence, Marshall, who "perceived himself to be above party, dedicated only to preserving the nation's independence,"[81] was convinced that such pro-French feelings "[were] inimical to the survival of the United States as a nation."[82]

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74. Rudko, *supra* note 53, at 13.

75. *Id.*

76. *Id.*

77. *Id.* at 53.

78. *See id.* at 13-14.

79. *Id.* at 14.

80. *Id.*

81. *Id.* at 49 (citations omitted).

82. *Id.* at 16.

After the French declared war against the British and the subsequent adoption of the policy of neutrality by the Washington administration in 1793, relations between the United States and France, who felt that the Proclamation did not honor the United States' obligations under treaties executed in 1778, deteriorated.[83] Therefore, as mentioned above,[84] in an effort to mend U.S.-French relations, in 1797 President Adams sent John Marshall, Charles Coteworth Pinckney, and Elbridge Gerry to France "to redefine French-American relations, to restore diplomatic harmony, and to assert the sovereignty of the United States."[85] Notably, Marshall's role, in congruence with his federalist philosophy, was to assert and preserve both the "independence and neutrality" of the United States.[86]

Marshall's experience during his mission to France helped shape and cultivate his understanding of the importance of the United States' role as a neutral.[87] The purpose of the policy of neutrality was strictly self-interest: "The United States, attempting to become an *independent commercial nation*, adopted the relatively undeveloped concept in international law of neutrality."[88] Indeed, the prevalence of "intense maritime warfare," which characterized much of the end of the 1790s increased the importance of the law of neutrality.[89] Without structuring the legal principles supporting the policy of neutrality, it would have been difficult, if not impossible, for the United States to emerge as an independent commercial nation.

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83. *Id.* at 46.

84. *See supra*, text accompanying note 17.

85. Rudko, *supra* note 53, at 47.

86. *Id.* at 49 (citations omitted).

87. *Id.* at 56 (quoting Marshall's response to French demands: "I told [Mr. Hottinguer] that . . . no nation estimated [France's] power more highly than America or wished more to be on amicable terms with her but that our object was still dearer to us than the friendship of France which was *our national independence. That America had taken a neutral station.*") (citing 3 THE PAPERS OF JOHN MARSHALL, *supra* note 71, at 173) (emphasis added).

88. *Id.* at 53 (emphasis added). The author further states that "[t]he United States' policy of neutrality toward all of Europe was prompted by the developing nation's desire to trade." *Id.* at 73.

89. *Id.* at 69.

As seen later in this Essay,[90] Marshall's experience in France not only prepared him to deal with issues raised by the prize cases but was essential to his ability to deal with those issues.[91] Similarly influential was his experience as a Secretary of State from 1800. Just prior to joining the Supreme Court, Marshall represented the Adams administration, particularly in its protestations of the partiality of British admiralty courts for acquiescing to illegal captures and other practices inimical to U.S. commerce under the law of nations.[92] He made similar protests to Spain and relied on the eighteenth century international legal jurist, Vattel, in so doing.[93]

C. *The Later Marshall: Using the Court to Solidify the Commercial Rights of Non Belligerents and Neutrals During Wartime*

While John Marshall the attorney often argued in favor of Virginian debtors, as a Supreme Court Justice he became the leading exponent of the rights of creditors and a defender of transnational commerce in the face of the depredations of American commerce on the high seas. There were already courts in the late eighteenth century that had begun recognizing the precarious predicament of U.S. commerce at the hands of more powerful military and maritime states. Thus, in 1793, the District Court of Pennsylvania observed that it was "difficult for a *neutral nation*, with the best dispositions, so to conduct itself as not to displease one or the other of belligerent parties, heated with the rage of war, and jealous of even common acts of justice or friendship on its part."[94]

During Marshall's time on the Supreme Court, it was generally asserted that a successful belligerent had a right

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90. *See infra* Part II.C.

91. Rudko, *supra* note 53, at 68.

92. *Id.* at 106-09.

93. *Id.* at 110-11.

94. Findlay v. The William, 9 F. Cas. 57, 59 (D. Pa. 1793) (No. 4790) (emphasis added). Findlay also held, inter alia, that as a neutral nation, the United States does not have the right to affect the confiscation practices of another sovereign, but can forbid the sale of confiscated goods on American soil. *Id.*

to confiscate the private property of enemies and neutrals. The Supreme Court was, however, confronted not only by debtors from states like Virginia but also by foreigners asserting belligerent rights such as confiscation or defending their cargo from confiscation. As a result, the Court came to assume the status of a quasi-international tribunal, particularly in prize cases arising from the various wars of the period.[95] In addition, as one scholar has asserted, the Court in this period, "suggested itself as a useful means to deal with sensitive U.S. treaty controversies in a way the States might perceive as mindful of their respective internal sovereignties, and foreign states might perceive as credibly neutral."[96] As indicated earlier, neutrality was indeed the policy of early U.S. administrations.[97]

As a militarily and economically weak country in the late eighteenth century, various early U.S. administrations sought to adhere strictly to the "acknowledged laws of civilized nations," to ensure that U.S. commerce was not swept from the ocean by the ruinous and lawless depredations of more powerful states.[98] The challenge for the Supreme Court though was that the rules of the law of nations relating to belligerent rights and obligations were not as clear-cut. Many controversies that landed in the court required judicial innovation since they presented issues without clear answers under the law of nations or in the precedents of the court. As I will show, the court more often than not decided such cases in favor of the most liberal rules that permitted the continuation of commerce in the face of war—notwithstanding the fact that those cases would equally have been decided in favor of belligerent rights with the consequence of frustrating free commerce by

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95. James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 633 (1994).

96. Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1849 (2004).

97. "From the beginnings of its history, this country has been careful to maintain a neutral position between warring governments." Berg v. British & African Steam Navigation Co. (The *S.S. Appam*), 243 U.S. 124, 149 (1917); *see also infra* Part II.B.

98. LOSSING, *supra* note 36, at 154.

confiscating and sequestrating the cargo of neutrals and others in the high seas. My analysis below shows that the Marshall Court sought to conform the young country's views to its international legal obligations primarily motivated by its relative economic and military weaknesses. Second, that in seeking to ensure that the United States conformed its international legal obligations, the Marshall Court played a constructive role in solidifying the early regime of international economic governance through law.

The sense one gets in reading the decisions that Marshall helped craft as a Justice of the Supreme Court was that consistent with the policy of the Adams administration and as agreed at the Continental Congress,[99] the U.S. was playing by the rules of the law of nations in its commercial relations with the warring states of Europe. However, these states seldom played by these rules and as such it was necessary to develop a jurisprudence that could encourage resort to complete reciprocity between these states and the U.S. as a neutral power.[100]

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99. *See* Jay Stewart, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 825 n.24 ("The Continental Congress resolved to insist on strict compliance with the law of nations when determining the legality of captures on the high seas."); 14 JOURNALS OF THE CONTINENTAL CONGRESS 635 (W. Ford ed., 1909); *see also* Jesse S. Reeves, *The Influence of the Law of Nature Upon International Law in the United States*, 3 AM. J. INT'L L. 547, 556-57 (1909).

100. For example, Lossing notes that a French decree of December 17, 1807 promulgated in response to British decrees in turn sparked similar decrees from Spain and Holland. LOSSING, *supra* note 36, at 154. As a result, the commerce of the United States was "swept from the ocean" within a few months, even though it had been conducted "*in strict accordance with the acknowledged laws of civilized nations.*" *Id.* As a result, Lossing notes that the United States was

> utterly unable, by any power it then possessed, to resist the robbers upon the great highway of nations [and] the independence of the republic had no actual record. It had been theoretically declared on parchment a quarter of a century before, but the nation and its interests were now as much subservient to British orders in council and French imperial decrees as when George the Third sent governors to the colonies of which it was composed . . . .

Id. Most importantly, Lossing argues that "trade between the U.S. and the European possessions of Great Britain were placed on a footing of perfect reciprocity, but no concessions could be obtained as to the trade of the West Indies [by the Jay Treaty of 1794]." *Id.* at 150.

I want to begin this discussion with Chief Justice Marshall's 1801 decision in *Talbot v. Seeman*.[101] The following is the background to this case. In the 1790s, France commissioned its war vessels to seize certain U.S. ships. A French Executive Directory also permitted the seizure of any ship containing any item of English manufacture.[102] This led to the United States' first quasi-war. In retaliation to French privateering,[103] Congress authorized the capture of French military vessels[104] and the seizure of French cargo.[105] While the Congressional acts gave American vessels the right to seize French property, the laws were not unfettered[106] and contained a number of restrictions regarding the nature of property to be confiscated.[107] One act provided that aliens of hostile nations could depart the United States with their property intact.[108] *Talbot v. Seeman* involved the capture, authorized by the foregoing congressional legislation, of an English vessel that had been privateered under the authority of the French directory. The captor of the French commandeered vessel sought payment of salvage charges. Hence, in *Talbot*, Marshall and his fellow justices confronted the novel and

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101. 5 U.S. (1 Cranch) 1, 6 (1801).

102. *See* Law Which Determines the Character of Vessels from Their Cargo, Especially Those Loaded With English Merchandise, 29 Nivose *an* 6 (January 18, 1798), *in* Collection Complète, décrets, ordonnances, règlements et avis du Counseil d'Etat (Duvergier & Bocquet) [Duv. & Boc.], 1825, p. 214.

103. *See Talbot*, 5 U.S. at 6.

104. *See* Act of June 25, 1798, ch. 60, §§ 1–2, 1 Stat. 572, 572 (providing authority for the defense of the merchant vessels of the United States against French depredations).

105. *See* Act of March 2, 1799, ch. 2, § 6, 1 Stat. 613, 615-16 (providing further suspension of the commercial intercourse between the United States and France, and the dependencies thereof).

106. *See* Fehlings, *supra* note 9, at 111. Congress specifically withheld the right to prey upon unarmed French vessels in fear of an all-out war between the French and the United States. The United States' reluctance to authorize seizure of unarmed French vessels was less a product of enlightened thinking and more the product of America's fear of an all-out war and possible French invasion. *See id.*

107. *See* Act of Feb. 9, 1799, ch. 94, 50 Stat. 613 (providing further suspension of the commercial intercourse between the United States and France, and the dependencies thereof).

108. *See id.* at 615; JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 132 (1826).

unsettled question under the law of nations whether recaptured neutrals were liable for salvage.[109] The neutrality of the vessel was not in question as it had sailed from Hamburg, and Hamburg and France were neutrals to each other—unlike with the hostile relations of the French and the English and both of these countries and the United States throughout the late eighteenth to early nineteenth century.

Marshall and his fellow justices could well have answered this question of whether salvage was payable in one of several ways. They could have placed themselves in the position of a French admiralty court; they could have determined the case as if it was regulated by congressional legislation authorizing defense or reprisals against French vessels depredating U.S. commerce or they could have decided that the case had to be determined under the laws of war which were effectively the law of nations. All these alternatives placed the Court in the difficult position of having to decide on a question arising out of France's superior naval capabilities—either way the question implied was whether French privateering was permissible or a derogation of either French or U.S. law or of the law of nations.

The cautious manner in which Marshall asserted what Congress authorized is evident in the following quote:

> The substantial question here is, whether the case of the Amelia (the captured vessel under French command) is a *casus-belli*—whether she was an object of that limited war. The kind of war which existed was a war against all French force found upon the ocean, to seize it and bring it in, that it might not injure our commerce.[110]

Marshall frames the war as one not against France as such—but rather upon such French force as had injured U.S. commerce. In fact, Marshall goes on to distinguish between the object of destroying French armed force and French property. Marshall argues the object of the war was not to destroy French property. By arguing as such,

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109. Justice Marshall asserted years later in The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815), that "[e]ven in the case of salvage . . . no fixed rule is prescribed by the law of nations." *Id.*

110. Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 9 (1801).

Marshall is able to argue that it "made no difference in whom the absolute [title] property of the vessel was."[111] This is a crucial distinction since it lays down the boundary between war and commerce—war could be severed from commerce. In other words, the belligerent character of those privateering or commanding a vessel did not automatically infuse the character of the cargo. The character of the vessel's cargo was distinguishable from the hostile command of a vessel. The recapture of the vessel from France—the object of the limited war—did not interfere with the title to the property of the neutral owner of the cargo in the vessel.[112]

Further Marshall was careful in answering the question of whether the vessel's capture by France was justifiable by noting that if France had violated the law of nations, this gave the United States no justification for violating this law by re-taking the privateered vessel.[113] In any event, Marshall justified the retaking of the vessel by the United States on the basis that it was a neutral vessel captured by a belligerent,[114] and further that recaptures are "one of the incidents of war."[115] Marshall defends jurisdiction over the case on the view that federal courts had jurisdiction to determine whether the capture, re-capture and payment of salvage on re-capture were due under the laws of war.[116] In responding to the view that the law of nations only allowed the United States to protest French privateering and no more, Marshall said that it is only after having failed in its protests or its remonstrates against this conduct that the United States had authorized "limited hostilities" against France.[117] Thus, according to Marshall, the "respect due to France is totally unconnected with the danger in which her laws had placed the *Amelia*."[118] Thus, the danger placed on the *Amelia*,

111. *Id.*

112. *See id.*

113. *Id.* at 22.

114. *Id.* at 32, 36.

115. *Id.* at 42.

116. *Id.* at 36.

117. *Id.* at 41.

118. *Id.* at 40.

according to Marshall, was what would determine whether salvage was payable under the law of nations.[119] Marshall was of course not unaware of the ruinous nature of French depredations of U.S. commerce. As he noted:

> Much has been said about the general conduct of France and England on the seas, and it has been urged that the course of the latter has been still more injurious than that of the former. That is a consideration on to be taken up in this cause. Animadversions on either, in the present case, would be considered extremely unbecoming the judges of this court, who have only to enquire what was the real danger in which the laws of one of the countries placed the Amelia, and from which she has been freed by her recapture.[120]

Thus, by finding that the hostilities between the United States and France justified the recapture of the *Amelia*, Marshall placed the question of France's sovereignty and independence[121] not on the alter of a victor justifying it as the spoils of war, but rather as justified by the state of hostilities between France and the United States. In essence, Marshall adroitly declined to frame the issue of the vessel's recapture as one involving the superiority of the United States over France. Ultimately, Marshall finds (without the citation of any authorities) that since the *Amelia* had been placed in "real and imminent" danger, her captors were entitled to salvage.[122]

The next case I want to discuss to illustrate how Chief Justice Marshall helped in the solidification of liberal rules of international commerce is *The Nereide*.[123] The issue in *The Nereide* was whether war gives a belligerent the right to condemn, capture and confiscate the goods of a neutral or friend if carried in the armed vessel of an enemy. Justice Marshall took the opportunity to make the case for the expansive rights of neutrals during wartime. According to

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119. *Id.* at 41.

120. *Id.*

121. On the part of France, it had been urged that "France is an independent nation, entitled to the benefits of the law of the law of nations; and further that if she has violated them, we ought not to violate them also, but ought to remonstrate against such misconduct." *Id.* at 40.

122. *Id.* at 41-42.

123. 13 U.S. (9 Cranch) 388 (1815).

Marshall, armed neutrality had effected "a great revolution in the law of nations."[124] His observation that it was a maxim of the law of nations that "free ships should make free goods" became the basis of his conclusion that the converse maxim was equally true—that "a neutral may lawfully put his goods on board a ship for conveyance on the ocean."[125] He even concluded that this rule was "universally recognized as the original rule of the law of nations"[126] that dated back into antiquity[127] and he could find no writers contradicting it.[128]

In refuting that the right of a belligerent to search a neutral vessel was superior to the right of a neutral to carry cargo in a belligerent's vessel, Marshall asked:

> Is it a substantive and independent right wantonly, and in the pride of power, to vex and harass neutral commerce, because there is a capacity to do so? Or to indulge the idle and mischievous curiosity of looking into neutral trade? Or the assumption of a right to control it? If it be such a substantive and independent right, it would be better that cargoes should be inspected in port before the sailing of the vessel, or that belligerent licenses should be procured.[129]

This revealing passage suggests Justice Marshall's conclusion that the hostile character of a vessel does not attach to the goods of a neutral on board. According to Marshall, it matters not that the vessel is a belligerent one or that it is armed, since the goal of the neutral is the transportation of their goods which is permissible as long as the neutral does not participate in arming the vessel.[130] He even goes further to observe that if the belligerent vessel resisted the right of the enemy to search the vessel, this did not affect the neutral character of the goods on board.[131]

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124. *Id.* at 420.

125. *Id.* at 425.

126. *Id.*

127. *Id.* at 426.

128. *Id.*

129. *Id.* at 427.

130. *Id.* at 428.

131. *Id.* at 429-30.

Thus, a neutral in this position only exposes themselves to "capture and detention, but not to condemnation."[132]

Although Justice Marshall disavowed using the power of the Court to "tread the devious and intricate path of politics,"[133] Justice Johnson, who agreed with him, nevertheless singled out Spain as the only "civilized nation" that had declined to "unequivocally acknowledge" this right of neutrals.[134] Justice Johnson went further to conclude that even if Spain had adopted a different doctrine, "the practice of one nation, and that one not the most enlightened or commercial, ought not to be permitted to control the law of the world."[135] Both Justice Marshall's and Justice Johnson's opinions in *The Nereide* disclose their bias in favor of open commerce and against doctrines that would constrain the rights of neutrals during war to engage in trade. Thus even while disavowing a political role for the court in making rules, which he identified as a legislative function,[136] or in sorting out the political differences between warring belligerents, Justice Johnson too participated in solidifying the announced policy of various U.S. administrations in favor of neutral commerce at a time of U.S. military and economic weakness in relation to her trading partners. [137]

While Justices Marshall and Johnson were unequivocal in announcing that belligerents had no right to condemn without compensation the goods of a neutral on board a belligerent vessel, Justice Story found little support for it in the law of nations or in "the elaborate treatises of Grotius, or Puffendorf, or Vattel."[138] For Justice Story, "modern commerce" had raised many intricate questions for prize

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132. *Id.* at 432.

133. *Id.* at 423.

134. *Id.* at 433.

135. *Id.* at 434.

136. *Id.* at 435.

137. Notably, Marshall praised the "talents and virtues which adorned the cabinet of that day, on the patient fortitude with which it resisted the intemperate violence with which it was assailed, on the firmness with which it maintained those principles which its sense of duty prescribe . . . [and] on the wisdom of the rules it adopted." *Id.* at 422.

138. *Id.* at 437.

tribunals for which there are no clear rules.[139] After parsing through the cases and the law, Justice Story concluded

> that the act of sailing under belligerent or neutral convoy is of itself a violation of neutrality, and the ship and cargo if caught in delicto are justly confiscable; and further, that if resistance be necessary, as in my opinion it is not, to perfect the offence, still that the resistance of the convoy is to all purposes the resistance of the associated fleet.[140]

That Justices Marshall and Johnson, on the one hand, and Justice Story on the other, could arrive at such contradictory conclusions illustrates one of my central theses—that the law of nations on the questions in prize cases of the late eighteenth century were often novel and that the Marshall court played a crucial role in solidifying the emerging norms.

Perhaps no other statement in Justice Story's dissent is more telling than his observation that if the rule his brethren were espousing was adopted, "[i]t would strip from the conqueror all the fruits of victory, and lay them at the feet of those whose singular merit would consist in evading his rights, if not collusively in aiding his enemy."[141] For Justice Story, the rights of victorious belligerents to essentially condemn cargo of neutrals in belligerent vessels prevailed over the "false and hollow neutrality" of the rule that Justices Marshall and Johnson espoused in their opinion. Such false and hollow neutrality would in turn be "more injurious than the most active warfare"[142] much to the "dismay and ruin of inferior maritime powers."[143] The reason, according to Justice Story, that the Marshall/Johnson rule would be more ruinous to "inferior maritime powers" was that it would swallow the right of search and as such allow belligerents "to keep up armaments of incalculable size" under the disguise of carrying a neutrals goods.[144]

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139. *Id.* at 438.

140. *Id.* at 445.

141. *Id.* at 449.

142. *Id.*

143. *Id.*

144. *Id.* at 448-49.

Clearly then, the ability of neutrals, or inferior maritime powers as Justice Story referred to them, was a consideration in the outcome of *The Nereide*. This is unsurprising as late eighteenth to early nineteenth century U.S. administrations were committed to neutrality in the face of the depredations of U.S. commerce by the maritime powers of the period. My point is that Justice Marshall contributed to the then emerging rules of liberal commerce even when it seemed that the espousal of such rules could not be easily reconciled with "the privileges of an inoffensive neutral."[145]

Justice Marshall continued his adherence to the policy of neutrality by upholding the rights of neutrals in a series of other cases arising from the Quasi-War with France. For example, in *Maley v. Shattuck*,[146] William Maley, the commander of a public armed vessel belonging to the government of the United States took as prize a vessel belonging to Jared Shattuck, a U.S.-born merchant who was now a subject of the neutral state Denmark.[147] Justice Marshall reiterated the general rule that "a vessel libeled as enemy's property is condemned as prize, if she act in such a manner as to forfeit the protection to which she is entitled by her neutral character."[148] Nonetheless, Marshall, in scrutinizing the evidence, determined that Maley did not have sufficient cause to justify seizure, and therefore assessed damages against Maley.[149]

In *Little v. Barreme*,[150] two U.S. vessels captured a Danish vessel near Hispaniola pursuant to a non-intercourse law passed by Congress in 1799, whose purpose was to proscribe maritime commerce between the United States and France.[151] The act, in short, provided that a ship owned, hired, or employed by a citizen of the United States was prohibited from proceeding to any French port and, if such vessel were discovered, it would be subject to

145. *Id.* at 454 (Story, J., concurring).

146. 7 U.S. (3 Cranch) 458 (1806); *see also* RUDKO, *supra* note 53, at 71.

147. *Maley*, 7 U.S. at 459.

148. *Id.* at 487.

149. *Id.* at 490.

150. 6 U.S. (2 Cranch) 170 (1804); *see also* RUDKO, *supra* note 53, at 71.

151. 6 U.S. at 170.

seizure.[152] Further, the act empowered the President of the United States to instruct public armed vessels to stop and examine any such vessel upon suspicion and, if warranted, seizure of the vessel.[153] The district court, which denied damages, held that the captors did not provide "sufficient proof to bring this vessel and cargo so far within the provisions of these statutes as to incur a forfeiture thereof."[154] Ultimately Justice Marshall affirmed the decision of the district court and thereby reinforced the rights of neutrals.[155]

Also, in *Sands v. Knox*,[156] a resident of the United States owned a vessel, the *Juno*.[157] The vessel proceeded from Connecticut to St. Croix, which was under the power of Denmark—a neutral state.[158] At this point the vessel was sold to a Danish subject. The vessel then proceeded to the French-governed St. Domingo before returning to the United States.[159] Pursuant to the non-intercourse law, the customs collector in New York seized and detained the vessel.[160] Rejecting arguments, which interpreted the non-intercourse law strictly so as to condone the seizure, Justice Marshall, in upholding the rights of neutrals, held that the non-intercourse law "did not intend to affect the sale of vessels of the United States, or to impose any disability on the vessel, after bona fide sale and transfer to a foreigner."[161]

As Frances Howell Rudko summarizes:

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152. *Id.*

153. *Id.* at 171.

154. *Id.* at 172.

155. *Id.* at 178. Justice Marshall, in affirming the district court's decision, stated: "Of consequence, however strong the circumstances might be, which induced Captain Little to suspect [the Danish vessel] to be an *American* vessel, they could not excuse the detention of her, since he would not have been authorized to detain her had she been really *American*." *Id.*

156. 7 U.S. (3 Cranch) 499 (1806); *see also* Rudko, *supra* note 53, at 71.

157. 7 U.S. at 499.

158. *Id.* at 500.

159. *Id.* at 499-500.

160. *Id.* at 499.

161. *Id.* at 503.

> These cases arising from the Quasi-War illustrate that Marshall . . . construed the law to effect the rights of neutrals. He was aware . . . that search and seizure was a right to be exercised only on belligerent goods and vessels. By objectively allowing damages, he helped to police a practice subject to abuse. In this way, he continued to protest the violation of neutral rights.[162]

I would also like to credit or at least associate Justice Marshall with endorsing the innovation in the rules of war that where private property belonging to a national of an enemy state is within the other belligerent state's territory, it does not become automatically extinguished by the conquest. Instead, as Justice Marshall held in *Brown v. United States*,[163] such property is regarded as being held in suspension, pending its return to its owner upon cessation of hostilities. Marshall's strong stance against a victorious belligerent's right to confiscate the private property of the nationals of an enemy state is evidenced by his assertion in *Brown v. United States* that the "practice of forbearing to seize and confiscate debts and credits" is universally received and that if confiscated, such debts and credits revive to their owner "on the restoration of peace."[164] This principle was later followed in British courts. In one case, the Chancery Division held "it is a familiar principle of

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162. Rudko, *supra* note 53, at 72.

163. 12 U.S. (8 Cranch) 110 (1814).

164. *Id.* at 427. In a more forthright statement of the principle, Marshall observed that the "proposition that a declaration of war does not in itself enact a confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely free from doubt." *Id.* at 127. However, Marshall conceded that war gives a sovereign the "full right to take the persons and confiscate the property of the enemy," but that this "rigid rule" had been moderated by "the humane and wise policy of modern times." *Id.* at 122-23. By contrast, Justice Story dissented, arguing that while mere declaration of war did not *ipso facto* operate as a confiscation of the property of enemy aliens, such property is liable to confiscation "at the discretion of the sovereign power having the conduct and execution of the war" and that the law of nations "is resorted to merely as a limitation of this discretion, not as conferring authority to exercise it." *Id.* at 154 (Story, J., dissenting). Justice Marshall appeared to have affirmed the modern rule prohibiting confiscation under the law of nations, and the sovereign power to confiscate enemy property. *See id.*; *see also* United States v. Percheman, 32 U.S. (7 Pet.) 51, 51 (1833) (affirming the rule against confiscation under the law of nations unambiguously).

English law that the outbreak of war effects no confiscation or forfeiture of enemy property."[165]

It is, however, only fair to observe that the Supreme Court's embrace of broader rights in favor of commerce and the consequential contraction of belligerent rights pre-dated Marshall's entry into the court. As already noted above, Marshall the attorney lost his only case before the Court in *Ware v. Hylton*.[166] In this case, Marshall had supported the rights of a Virginian businessman who owed pre-revolutionary debts to British creditors. One of Marshall's losing arguments was that Virginia, having prevailed over the British in the Revolutionary War, was entitled to extinguish debts its citizens owed British creditors. In his concurring opinion, Justice Paterson noted:

> Considering . . . the usages of civilized nations, and the opinion of modern writers, relative to confiscation, and also the circumstances under which these debts were contracted. . . . [W]e ought to admit of no comment that will narrow and restrict their operation and import. The construction of a treaty made in favor of such creditors, and for the restoration and enforcement of pre-existing contracts, ought to be liberal and benign.[167]

Justice Chase had been more emphatic about the importance of creditor rights observing that

> Congress had the power to sacrifice the rights and interests of private citizens to secure the safety and prosperity of the public . . . [and as such] ample compensation ought to be made to all the debtors who [were] injured by the treaty, for the benefit of the public.[168]

Thus, although there existed a doctrine of non-intercourse prohibiting commerce between belligerent states, the strictness of this doctrine had begun to be attenuated by the late eighteenth century.[169] Some

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165. Fried Krupp Aktiengesellschaft v. Orconera Iron Ore Co., (1919) 88 Eng. Rep. 304, 309 (Ch.).

166. 3 U.S. (3 Dall.) 199 (1796).

167. *Id.* at 255-56.

168. *Id.* at 245.

169. The strict application of this rule is demonstrated in a Supreme Court decision from 1814, where Judge Johnson noted in part:

commentators have dated the attenuation of this rule to end the nineteenth century when it is said that "rapid advances in civilization," "progressive public opinion," and the "influence of Christianity" made it possible to differentiate between military as opposed to civil affairs and between the conduct of war and of commerce.[170] However, as the foregoing materials show, this rule was already under steady erosion under rather dissimilar geo-political and military circumstances for the United States a century earlier. As the U.S. international legal jurist of that period John Bassett Moore observed, attitudes favorable towards commerce even during war were informed by "a moral revolt" and a "new creed," a "loftier conception [of] the destiny of and rights of man and of a more humane spirit" according to which eliminating the confiscation of property was necessary to "assure to the world's commerce a legitimate and definite freedom."[171] Moore's justification of the rule is a modernist emancipatory universalism, which is argued to have prevailed over the barbarity of war and similar dark forces in the interest of avoiding the adverse consequences of war.[172]

To conclude this discussion, I will go back to Justice Marshall for a moment. Another of his significant decisions in support of commerce in the face of the assertion of rights

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> The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy . . . .

The Rapid, 12 U.S. (8 Cranch) 155, 161 (1814).

170. COLEMAN PHILLIPSON, THE EFFECT OF WAR ON CONTRACTS AND ON TRADING ASSOCIATIONS IN TERRITORIES OF BELLIGERENTS (1909); *see also* ALBERT O. HIRSCHMAN, RIVAL VIEWS OF MARKET SOCIETY AND OTHER RECENT ESSAYS 107 (1992) (noting William Robertson's assertion that "[c]ommerce . . . softens and polishes the manners of men," based off of Montesquieu's statement that "wherever there is commerce, manners are gentle.").

171. JOHN BASSETT MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS AND OTHER ESSAYS 13-14 (1924).

172. For a similar exposition of the expunging of religion from international law, see David Kennedy, *Images of Religion in International Legal Theory*, *in* THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW 137, 142-43 (Mark Janis ed., 1991).

of prevailing belligerents is *United States v. Percheman.*[173] Here Justice Marshall asserted that:

> [t]he modern usage of nations, which has become law, would be violated; that sense of justice and of right, which is acknowledged and felt by the whole civilized world, would be outraged; if private property should generally be confiscated and private rights annulled, on a change in the sovereignty of the country. The people change their allegiance . . . but their relations to each other, and their rights of property remain undisturbed.[174]

Justice Marshall's viewpoint is also evidenced in his criticisms of the decisions of the British Courts. He attributed the breakdown of negotiations over British debts "'to the wild, extensive, and unreasonable construction'" of Article VI of the Jay Treaty.[175] For example, although the Jay Treaty defined "contraband" as anything that might directly serve to equip a vessel, Marshall contended that the British construction of the definition essentially ignored "directly" by construing the term loosely.[176] Marshall also expressed disgust at British courts' lack of respect for the law by condoning illegal captures or denying damages.[177] Although Marshall respected Sir William Scott, Judge of the British High Court of Admiralty, the former noted that the decisions of the latter definitely favored the British and did not support international law. According to Justice Marshall, Sir Scott's jurisprudence seemed to have been influenced by an unconscious bias of Great Britain's being a

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173. 32 U.S. (7 Pet.) 51 (1833).

174. *Id.* at 51. The government's position in the case is captured by the following quote:

> What, indeed, can be more clearly entitled to rank among things favourable, than engagements between nations securing the private property of faithful subjects, honestly acquired under a government which is on the eve of relinquishing their allegiance, and confided to the pledged protection of that country [sic] which is about to receive them as citizens?

Id. at 68.

175. RUDKO, *supra* note 53, at 106 (citing Letter from John Marshall to Rufus King (Sept. 20, 1800), *in* 4 THE PAPERS OF JOHN MARSHALL 285 (Charles T. Cullen ed., 1984)).

176. *Id.* at 106.

177. *Id.* at 107.

"great maritime country."[178] In particular, Marshall took issue with Sir Scott's decisions involving determination of the domicile of a person whose property had been confiscated by mere residence in a foreign country without reference to what the person may have intended.[179] He also critiqued his brethren in the *Venus* case for failing to inquire into the intentions of such a person, a failure which Marshall regarded as leading to the injustice of confiscating the property of such a person by virtue of their mere presence abroad.

Thus, throughout his career in the Supreme Court, Justice Marshall consistently asserted the rights of those involved in commercial activity against claims of the superiority of rights of victorious belligerents. His jurisprudence had a definite mark in solidifying commercial rights when they came in tension with the privileges of belligerents. Unsurprisingly, the *Percheman* decision was cited in a South African court not long thereafter.[180] That this jurisprudence had already become that far known at the time is suggestive of the innovations of Justice Marshall in carving out spaces for legitimate commerce at a time when the assertion of the rights of belligerents was in the ascendant. In addition, as a further testament to the importance of Marshall's contribution to the law of prize, which at the time was the most critical and pertinent branch of international law, some commentators during Marshall's time counted him amongst the leading international jurists, including Sir William Scott, Robert Joseph Pothier, and Cornelius Bynkershoek.[181] Further, as already noted, these liberal principles espoused by Justice Marshall were about a century later to be enshrined in the Hague Regulations of 1907.[182] Yet, notwithstanding these liberal rules of commercial relations that Justice Marshall espoused, in Part III, I show how he played a central role in justifying the power of conquest and discovery in the deprivation of Indians of their territory and their equal

178. The Venus, 12 U.S. (8 Cranch) 253, 299 (1814).

179. *Id.* at 316.

180. W. Rand Century Gold Mining Co. v. King, 2 K.B. 391 (1905).

181. RUDKO, *supra* note 53, at 72.

182. Regulations concerning the Laws and Customs of War on Land. The Hague, 18 Oct. 1907.

status as nations with whom the emerging United States could engage in commerce with complete reciprocity.

III. A DIFFERENT RULE FOR UNITED STATES/INDIAN ECONOMIC RELATIONS [183]

Just at the moment he was announcing the most liberal rules for commerce between European nations and the early United States, Justice Marshall was simultaneously contributing to the emergence of a jurisprudence that strongly favored the view that conquest[184] and discovery[185] give conquerors a legitimate title to the territory of native Americans. In *Johnson v. McIntosh*,[186] the question was whether two Indian chiefs had the power to pass on a valid title to private individuals that was recognizable in the Courts of the United States.[187] For Marshall, the question at the end of the day was whether, after the assumption of dominion over all the territory of the U.S. first by the British Crown and subsequently by the United States, Indians had any title over their territory to pass on. In

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183. This part borrows heavily from James Thuo Gathii, *Commerce, Conquest and Wartime Confiscation*, 31 BROOK. J. INT'L L. 709 (2006)

184. In Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), Marshall held that "[c]onquest gives a title which Courts of the Conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the ordinal justice of the claim which has been successfully asserted." *Id.* at 588.

185. According to Marshall,

> [h]owever extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

Id. at 591. In affirming this, Marshall further notes,

> This opinion conforms precisely to the principle which has been supposed to be recognised by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment.

Id. at 592; *see also id.* at 595.

186. *Id.*

187. *Id.* at 572.

short, for Marshall the issue was whether "a title acquired from the Indians would be valid against a title acquired from the Crown."[188]

For Justice Marshall, the rule of decision in the case had been necessitated by the desire to reduce inter-European conflict over title to "this immense continent" which he noted that the "great nations of Europe" sought appropriate.[189] This rule, he held, was the principle of discovery, which was consummated by the possession of territory by the subjects of respective European countries. Such discovery in turn operated to prevent other European states from claiming title to the discovered territory.[190] What of the Indians who occupied the territory? According to Justice Marshall, the "exclusive right of the United States to extinguish their title, and to grant the soil" had never been doubted.[191]

Having recognized the title of the United States over their land, Marshall concluded that this title was incompatible with an "absolute and complete title in the Indians."[192] It is at this point that Marshall then justified the title of the United States on the basis of conquest. According to Marshall, conquest gave valid title that the "[c]ourts of the conqueror cannot deny," notwithstanding questions about the "original justice" of the assertion of this title.[193] Such a title acquired by conquest was maintainable by force.[194]

The reason the title was maintainable by force, according to Justice Marshall, was because Indians were "fierce savages, whose occupation was war, and whose substance was drawn chiefly from the forest."[195] Marshall

188. *Id.* at 604.

189. *Id.* at 573.

190. *Id.*; *see also id.* at 584.

191. *Id.* at 586.

192. *Id.* at 588.

193. *Id.*

194. *Id.* at 589.

195. *Id.* at 590.

therefore argued that it was necessary to enforce European claims to the land they occupied "by the sword."[196]

Thus although he had spoken eloquently against the rights of belligerents insofar as they undermined free commerce in the United States' international relations with its European counterparts, for Indians, war was the solution for their subjugation. Marshall further endorsed this subjugation by arguing that "European policy, numbers, and skill, prevailed" over Indian aggression.[197]

As Marshall's holding in *Johnson v. McIntosh* illustrates, the Supreme Court endorsed the power of belligerent confiscation not simply out of a belligerent's absolute power but rather out of the presumed backwardness of those whose territory or property had been seized by virtue of the proclaimed superiority of Europeans over these peoples. It was because Indians were so different that he held the law that applies as between conqueror and conquered was inapplicable to them and, instead, a "new and different rule, better adapted to the actual state of things was unavoidable."[198] This, according to Justice

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196. *Id.* Marshall claimed that the Indians were incapable of legally owning the land and that they merely possessed it and, as such, could not pass on valid title to the White population. Marshall claimed that the Indians were merely the ancient inhabitants of the land and that the territory was held by the British Crown prior to its occupation by White settlers. *Id.* at 591.

197. *Id.* at 590. Note also his justification of the doctrine of discovery in the later case of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543-44 (1832):

> After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting and fishing . . . . [D]iscovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession.

198. *Id* at 591. This basis of this doctrine of the supremacy of Europeans over non-Europeans in the common law finds expression in the landmark 1602 Calvin's Case where Lord Coke noted:

> And upon this ground there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, seeing that he hath *vitæ et necis potestatem*, he may at his pleasure alter and change the laws of that kingdom: but until be doth make an alteration of those laws the ancient laws of that kingdom remain. . . . But if a Christian King should conquer a kingdom of an infidel, and bring them

Marshall, was the rule of discovery under which Indians were recognized as mere occupants of their land.

In *Cherokee Nation v. Georgia*,[199] Justice Marshall announced that the relation of Indians to the United States was that of "a ward to his guardian."[200] Indians, according to Marshall, were essentially like children in relation to the United States rather than sovereign nations. As such, they were obliged to look to the U.S. government for protection, kindness and power as well as to seek out its help in fulfilling their needs.[201] Furthermore, rather then proceeding to give the Cherokees protection from their forcible eviction from Georgia onto the deadly Trail of Tears that ensued, Justice Marshall declared that even if the Cherokee Nation had rights they could assert, the Supreme Court was "not the tribunal which can redress the past or prevent the future."[202] On his part, Justice Johnson regarded the forcible exertion of authority over the Cherokees by the State of Georgia as not only legally permissible but as "a contest for empire."[203] By contrast, Justice Thompson's dissent would have recognized the sovereignty of the Cherokee Nation and allowed them jurisdiction to enjoin the State of Georgia from forcibly evicting them from their lands.[204]

Finally, in *Worcester v Georgia*,[205] Justice Marshall affirmed the doctrine of discovery and further justified the subjugation of Indians on the unsuccessful attempts the United States had made in negotiating and regulating trade

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> under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue . . . .

Calvin v. Smith, (1608) 77 Eng. Rep. 377, 397-98 (K.B.).

199. 30 U.S. (5 Pet.) 1, 17 (1831).

200. *See id.*

201. *See id.* For a further exploration of this theme, see James Gathii, *Colonialism, Imperialism and International Law*, 54 BUFF. L. REV. (forthcoming Jan. 2007).

202. *Id.* at 20.

203. *Id.* at 29.

204. *See id.* at 50-80 (Thompson, J., dissenting).

205. 31 U.S. (6 Pet.) 515 (1832), *superseded by statute*, 43 U.S.C. § 666 (2000).

with them.[206] According to Marshall, war was necessary to deal with the Indians since regular commercial contact could not be established with them.[207] In any event, we know that Marshall had already concluded the Indians were incapable of being integrated into the United States and that relations with them were that of a ward and its guardian.[208]

Marshall's jurisprudence sounds eerily similar to sixteenth century jurist Francisco de Vitoria's justification of the Spanish conquest of the Indians. Vitoria justified as lawful the killing of Indians in the course of Spanish colonization noting that this is "'especially the case against the unbeliever, from whom it is useless ever to hope for a just peace on any terms.'"[209] War and the destruction of all

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206. *Id.* at 558.

207. *Id.* In a groundbreaking analysis of the writings of Vitoria, the sixteenth century international legal jurist credited with being one of the founders of international law, Antony Anghie shows that while Vitoria exhibited a progressive approach to dealing with the Indians by arguing in favor of incorporating them within the universal law of *jus gentium*, their incorporation into this universal law, in turn, served as the basis for justifying the imposition of Spanish "discipline" on them. Vitoria argued that since the Indians were resisting the right of the Spanish to sojourn on their territory, the Spanish were entitled to use forcible means to enforce this right. In addition, Vitoria argued that the ordinary prohibitions of waging war do not apply to Indians. *See* Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321, 331 (1996). In Vitoria's words:

> And so when a war is at that pass that the indiscriminate spoliation of all enemy-subjects alike and the seizure of all their goods are justifiable, then it is also justifiable to carry all enemy subjects off into captivity, whether they be guilty or guiltless. And inasmuch as war with pagans is of this type, seeing that it is perpetual and that they can never make amends for the wrongs and damages they have wrought, it is indubitably lawful to carry off both the children and women of the Saracens into captivity and slavery.

Id. at 330.

208. For further analysis, see Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 246, which argues that under this Eurocentric jurisprudence, conquest was thought necessary to bring "the infidels and savages of America 'to human civility,' and to a settled and quiet Government." *Id.*

209. Anghie, *supra* note 207, at 330 (quoting Franciscus De Victoria, *De Indis Relectio Posterior, sive De Iure Belli Hispanorum in Barbaros*, *in* THE CLASSICS OF INTERNATIONAL LAW 163, 163 (photo. reprint 1994) (Ernest Nys ed., John Pawley Bate trans., Carnegie Inst. Wash. 1917) (1557).

the Indians who could bear arms against the invading Spanish conquerors—or in contravention of the right of the Spanish to sojourn on Indian territory—was the only remedy available to the Spaniards.[210]

Like with Vitoria, the racial charge in Justice Marshall's jurisprudence with respect to non-Christian and non-European peoples is strikingly evident. This is radically different from the jurisprudence of neutrality that Justice Marshall helped crystallize in relations between the United States and its European counterparts. In effect, one could surmise from our discussion from Part II above that the Marshall Court espoused and helped consolidate two very different legal regimes of international commercial governance. On the one hand, there was the regime of liberal commerce he promoted against the countervailing rights of belligerents, and on the other hand, there was the illiberal regime of conquest and subjugation that he helped establish in U.S.-Indian relations.

Marshall's federal Indian law jurisprudence arose in the encounter between metropolitan policy and the resistance of non-Europeans against colonization.[211] As Laura Benton has argued, the expansion of metropolitan authority over colonial peoples produced predictable "routines for incorporating groups with separate legal identities in production and trade and for accommodating (or changing) culturally diverse ways of viewing the regulation and exchange of property."[212] The Marshall solution for ordering these relations with the Indians was "Christian subjugation and remediation."[213] By contrast, Marshall announced the most liberal rules in relations between the weak maritime United States of the late eighteenth century. Ordering the economic relations of the

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210. Similarly, Robert A. Williams argues that under this Eurocentric jurisprudence, conquest was thought necessary to "bring the infidels and savages of America to human civility, and to a settled and quiet Government." Williams, supra note 208, at 246.

211. Here I am heavily influenced by LAUREN BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400-1900, at 4-5 (2002).

212. *Id.* at 5.

213. Williams, *supra* note 208, at 247.

late eighteenth century United States was thus ultimately a question of power.[214]

CONCLUSION

The demand for rules of liberal commerce is often traced to market forces or population growth.[215] This market-oriented or, "Smithian," and demographic account of the rise of liberal rules of international commerce, however, understate the importance of military and economic weakness as factors in the development and consolidation of liberal rules of commerce. The rules of neutrality that the Marshall court promoted in the face of depredations of U.S. commerce were eventually recognized in the 1907 Hague Regulations.[216] These regulations overwhelmingly give commerce and private property safe passage during wartime.[217]

Today, this legacy of unequal regimes in international economic governance largely remains intact. Reciprocity between western industrialized countries has largely been achieved. However, a non-reciprocal regime remains embedded with the international economic order in relations between western industrialized economies and contemporary developing economies, which largely remain agrarian. For example, for about the last five or so decades there has been more or less full reciprocity of the industrialized products of western economies within the international trade regime established under the aegis of GATT in 1948,[218] while within the same time period there

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214. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 675 (1989) similarly argues that the issues of power and jurisdiction dominate federal courts' jurisprudence.

215. *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); DOUGLASS C. NORTH & ROBERT PAUL THOMAS, THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY (1973). *But see* Robert Brenner, *The Origins of Capitalist Development: A Critique of Neo-Smithian Marxism*, 104 NEW LEFT REV. 25, 58 (1977).

216. *See supra* note 182.

217. *See* Berg v. British & African Steam Navigation Co. (The *S.S. Appam*), 243 U.S. 124, 150-51 (1917).

218. For a further exploration of this theme, see James Thuo Gathii, *Process and Substance in WTO Reform*, 56 RUTGERS L. REV. 885 (2004); *see also* The

has been no full reciprocity for the agricultural products of developing countries in western markets within this regime.

This account of the relevance of military and economic power or lack thereof leads to the following crucial insight of this Essay. Economically and militarily weak countries are very likely to seek the promotion and protection of international legal norms to safeguard their commercial rights from violation and abuse from more economically and militarily powerful countries. In essence, weaker countries have big incentives to persuade more powerful countries to build and to play by some common rules that are beneficial to all countries whether rich or poor or militarily powerful or not. While there is an already established literature demonstrating the incentives of economically prosperous countries promoting, shaping, and imposing their preferred norms of international economic behavior on less prosperous nations,[219] I hope this Essay has served to illustrate that it is in the interests of less prosperous nations to promote the promulgation of rules of international economic governance beneficial to all States.

General Agreement on Tariffs and Trade, (Oct. 30, 1947) T.I.A.S. No. 1700, 55 U.N.T.S. 194.

219. This is of course not to suggest that militarily and economically powerful countries have no incentive to develop or comply with international legal norms. *See* JOSEPH S. NYE, JR., THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE 17 (2002).